80-1002

No. .....

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

*Petitioners,*

—against—

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The principle questions presented for review are:

1. Whether the standard of "free appropriate public education" adopted by the Court of Appeals, by its affirmance of the District Court decision, will cause chaos in the administration of the Education of All Handicapped Children Act of 1975, 20 U.S.C. 1401 et. seq.

2. Whether the Court of Appeals misconstrued the function of a state plan for "free appropriate public education", approved by the Federal Commissioner of Education under the Act, when it failed to order dismissal of a complaint to provide an interpreter for a deaf student, upon a demonstration by the local school district that it was in conformity with the state plan.

3. Whether, in light of the clear language of the Act, which mandates exam-

ination of unique individual needs before placement of handicapped pupils can be made, the Court of Appeals correctly affirmed the decision of the District Court which was based on the syllogism that: all deaf people need sign language interpreters, Petitioner is deaf, therefore Petitioner must have a sign language interpreter.

4. Whether the federal courts have jurisdiction to hear cases arising under the Act prior to completion of the administrative procedures contained in the Act.

5. Whether the Court of Appeals' attempt to limit the applicability of its decision to the facts of this case constituted error, in view of the national importance of the issue and the precedential weight its opinion has given to the District Court decision.

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## PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding before the Court of Appeals and the District Court.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, for which review is sought, and its order denying rehearing, are not yet reported. The opinion of the District Court (S.D.N.Y.) is reported at 483 F.Supp. 528, and the District Court's memorandum opinion and order are reported at 438 F.Supp. 536. These documents, as well as the decisions of the New York State Commissioner of Education and the Independent Hearing Officer are included in the Appendix to this Petition. .

## JURISDICTION

The opinion of the Court of Appeals was filed on July 17, 1980. Petitioners' Petition for Rehearing, which was timely filed, was denied by the Court of Appeals on September 17, 1980. The judgment of the Court of Appeals was filed on October

1, 1980. This Court's jurisdiction is invoked under 28 U.S.C. Section 1234(1).

## STATUTE INVOLVED

The statute in question in this case is the Education of All Handicapped Children Act of 1975, 20 U.S.C. 1401 et. Seq. Pertinent Sections of the statute, as well as pertinent sections of the Regulations promulgated under it, 45 C.F.R. 121a., are reproduced in the Appendix.

## STATEMENT OF THE CASE

In September, 1978, the Hendrick Hudson Central School District placed Amy Rowley, a deaf first grade student who has significant residual hearing in lower frequencies and can distinguish vowel sounds, in a regular classroom setting with the supportive services of

a certified teacher of the deaf, a speech and language therapist and a discrete sound amplification device. A teletype machine was installed in the school's office to communicate with Amy's parents, Clifford and Nancy Rowley, who are also deaf.

A sign language interpreter was placed in Amy's kindergarten class for a trial period to determine the efficacy of the service. The School District administration, the classroom teachers, and the interpreter all concluded that the service was unessential and might ultimately prove to be harmful to Amy's academic and social development, which was outstanding.

Her parents appealed the determination to an Independent Hearing Officer, on the ground that every deaf student has a right to an interpreter upon

parental demand, regardless of how the child is achieving academically and socially. The Hearing Officer upheld the School District's determination on the ground that the placement and services were appropriate, and were resulting in academic and social success for Amy.

The Rowleys appealed to the New York State Commissioner of Education, who upheld the Hearing Officer's determination and found the School District's determination in compliance with the State's plan.

That determination was appealed to the U.S. District Court for the Southern District of New York pursuant to 20 U.S.C. 1415(e)(2). The Plaintiffs moved for a preliminary injunction; the District moved to dismiss the complaint on the ground that the District's determination was in conformity with the State plan and the Plaintiffs had not named the State Com-

missioner of Education as a Defendant. The District Court denied the School District's motion, but ordered the Commissioner of Education added as a Defendant. The Plaintiffs and the District (the Commissioner had not yet been formally joined as a party defendant) stipulated that the Court's judgment on Amy's 1978-79 placement would be binding on the parties for her 1979-80 placement. The Commissioner objected to the Court's jurisdiction on the ground that no determination for 1979-80 could be made without the Commissioner's prior review and determination for that year, which had not been made. The motion for the preliminary injunction became a trial on the merits, by stipulation. The District Court erroneously determined that there was no statutory definition of "free appropriate public education" and that it

was consequently free to formulate its own definition that each handicapped child be given an opportunity to achieve a full potential commensurate with the opportunity provided to other children.

The Court said that its standard required the School District to measure the potential of the handicapped child, compare that potential to his performance and compare the resulting shortfall to the shortfall experienced by non-handicapped children. It held that no evidence had been received to determine or compare a shortfall and it was thus free to order provision of an interpreter for Amy because "every deaf child hears better in class with an interpreter."

The Court said the Commissioner had no right to review the determination for the 1979-80 school year prior to the Court's review.

The majority of the panel of the Court of Appeals of the Second Circuit affirmed. Judge Mansfield dissented on the ground that the District Court mistakenly formulated its own definition of an appropriate education, then misapplied its standard to reach a wrong result, ignored the role of the State plan and the fact it did not provide for an interpreter, and denied the Defendants due process by admitting hearsay documents which could not be cross-examined.

The Court of Appeals denied Appellants' timely joint motion for a rehearing en banc.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals adopted an erroneous standard of "free appropriate public education" by affirming the District Court determination, which, if left to stand, will cause chaos in the administration of the Act.

Unaware of the Act's definition of a "free appropriate public education", the District Court formulated a new definition which is unnecessary, unworkable and a departure from Congressional intent. It has no basis in the statutory wording or the legislative history of the Act.

The Court held "appropriate education" to mean:

> that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children. (A-C 10) [1] 483 F.Supp. at 534.

1. Citations to "R-A", "R-T", and R-E" are to the Record (Appendix, Transcript, and Exhibits, respectively) submitted to the Court of Appeals, and certified and transmitted to this Court. Citations to "A-A", "A-B", etc. are to the Appendices to this Petition.

The District Court based its definition on a standard found in a regulation[2] promulgated under an entirely different statute, the Rehabilitation Act of 1973, 29 U.S.C. 701 et. seq. ("Rehabilitation Act"), which provides for non-discriminatory rehabilitative services for the handicapped in order to promote equality of employment.

The Court found license to construct its definition in its assumption that the intent of the Act was to allow the courts freedom to interpret the goal of free appropriate public education. It said:

> Aside from the HEW regulation quoted above, it has been left entirely to the courts and the hearing officers to give content to the requirement of an "appropriate education". (A-C-10) 483 F.Supp. 528, 533.

2. 45 C.F.R. 84.33(b): Appropriate education. (1) For the purpose of this subpart, the provision of an appropriate education is the provision of a regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as

The intent of the instant Act is manifestly different. While the Rehabilitation Act mandates rehabilitative services designed to maximize the potential for employment of handicapped persons, this Act requires provision of special education and related services in order to enable handicapped pupils to benefit from education. The Rehabilitation Act contains provisions for vocational services, which include sign language interpreters (29 U.S.C. 777e), a clear demonstration that when Congress wanted to provide for a sign language interpreter it knew how to do so. Nowhere in this Act or the

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adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of Sections 84.34, 84.35 and 84.35. 45 C.F.R. 84.33(b).

Regulations promulgated under it is mention made of sign language interpreters. The omission is especially indicative of Congressional intent, in view of the long list of services provided to the deaf under the detailed definition of "Audiology" found at 45 C.F.R. 121a.13 (b)(1).

The District Court's determination that, under the Act the courts must give content to the requirement of an appropriate education, ignored the definitions of "free appropriate public education" (20 U.S.C. 1401(18), 45 C.F.R. 121a.4), "special education" (20 U.S.C. 1401(16), 45 C.F.R. 121a.14), and "related services" (20 U.S.C. 1401(17), 45 C.F.R. 121a.13) set forth in the Act and Regulations. These sections delineate the goals of "free appropriate public education".

Nevertheless, the District Court formulated a new definition which compels the local school districts to provide an

education which enables the handicapped child to achieve his full potential. (A-C 10) (483 F.Supp. 528, 534).

The Court went on to state that this standard requires:

> that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or "shortfall" be compared to the shortfall experienced by non-handicapped children. (A-C 13-14) 483 F.Supp. 528, 535.

The legislative history of the Act demonstrates that this was not the Congressional objective. Rather, the goal was that the educational program provided to handicapped children enable them to become independent and productive citizens, within the limits of their handicapping condition.

The Senate Report on the proposed legislation stated:

> With proper education services, many would be able to become productive citizens, contributing to society instead of being

> forced to remain burdens. Others, through such services would increase their independence, thus reducing their dependence on society.
> S.Rep. No. 94-168, 94th Cong., 1st Sess., reprinted in (1975) U.S. Code Cong. and Ad. News, 1425, 1433.

The Senate Floor debates on the proposed Act also demonstrate that the legislators' goal was enabling the handicapped to become independent, self-sufficient members of society. Senator Williams stated that:

> providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds.
> 121 Cong. Rec. 19492 (1975).

Senator Randolph concurred in this view and stated that passage of the bill would

> give these children the educational services they need to compete in today's changing world.
> 121 Cong. Rec. 37410 (1975).

In the debate in the House, Congressman Harkin said:

> With proper educational services provided now, at a young age, these children can become productive citizens, contributing to society instead of being left as burdens on our society.
> 121 Cong. Rec. 25541 (1975).

The legislative history of the Act shows that the definitions formulated by the District Court are at variance with the purpose of the Act. The Act was intended to enable the handicapped to become functioning members of society, insofar as their handicapping conditions allow. Its purpose was not to compel school districts to provide the handicapped with the opportunity to achieve maximum or full potential, however desirable that goal may be.

Not only were the District Court's formulations unnecessary in light of the statutory language, and inconsistent with

the legislative goals, they were also impossible of application. After delineating standards by which to measure provision of a "free appropriate public education", the Court found it impossible to apply them to the instant case, and therefore extrapolated from information purportedly applicable to all deaf students to the student in this case (see Point 3 infra).

The District Court's standard will be equally difficult to apply in other cases. While an attempt to evaluate the potential of a single child, based on the factors set forth by the Court, would prove to be an extremely difficult task;[3]

3. Attempting to evaluate an individual child's potential is an extremely difficult task, involving much speculation. "The response to almost any interesting question concerning the education of the handicapped is either that the answer is unknown or that no generalized beneficial effect of a given treatment can be demonstrated," Kirp,

an attempt to apply the same type of evaluative techniques to large groups of children would surely be an insurmountable one. Further, even if a method for such evaluation could be devised, parental objection to such exhaustive testing of all children would likely arise. Assuming, arguendo, that shortfall from potential is measurable, how is the population, against which the handicapped child's shortfall is to be judged, to be determined? A handicapped child in a population of overachievers would receive maximum help, but one in a population of underachievers would be severely deprived.

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Buss & Kuriloff, Legal Reform of Special Education: Empirical Studies and Procedural Proposals, 62 Cal. L. Rev. 40, 47 (1974). Dissent by Judge Mansfield (A-A 18) ____F2d ___, __.

In this case, the Court of Appeals has upheld a judicially formulated definition of the goal of a federal statute, in spite of the fact that definitions of the goal were clearly enunciated in both the statute and the regulations. The definition so formulated failed to reflect the legislative intent, as set forth in the legislative history of the Act.

The Court of Appeals stated: "our decision is limited to the unique facts of this case and is not intended as an authority beyond this case" (A-A7). ____ F2d ___, ___. However, whether or not the decision of the Court of Appeals is cited as authority in future cases, its affirmance gives greater precedential value to the decision of the District Court. The definition of "free appropriate public education" formulated by the District Court has already been cited

by other courts in other cases arising under the Act: Battle v. Com. of Pa., 629 F.2d 269 (3rd Cir., 1980); Springdale School District v. Sherry Grace, 494 F.Supp. 266 (W.D. Ark., 1980); Hines v. Pitt County Board of Education, 497 F.Supp. 403 (E.D.N.C., 1980).

If this court does not review this case and make a determination concerning the District Court's definition, two consequences are possible: first, that the Court's definition will become the accepted interpretation of the statutory language; and second, that several District Courts or Courts of Appeal will redefine "free appropriate public education", with the result that the Federal act will be implemented differently in various jurisdictions. If the second alternative were to occur, states such as New York, which are located in more than one district, could be faced with insur-

mountable difficulties in attempting to administer the Act.

As Judge Sloviter stated in his separate opinion (concurring and dissenting in part) in Battle v. Com. of Pa.:

> There is nothing in the statute which would warrant anything other than a uniformly applicable interpretation of the nationally prescribed goal of a "free appropriate education".

629 F2d 269, 284.

Certiori should be granted so that this court may determine whether the District Court's formulation should supercede the definitions contained in the Act and the Regulations promulgated under them, whether the definitions contained in the statutory scheme are sufficient, or whether a new definition formulated by this Court should take precedence.

2. The failure of the Court of Appeals to order dismissal of the complaint upon a demonstration that the School District was in conformity with the State plan approved by the Federal Commissioner casts grave doubt on the validity, purpose and function of state plans under the Act.

In his dissent in the Court of Appeals, Judge Mansfield stated:

> Thus the scope and range of an appropriate education is left primarily to the states, which are given broad authority to prescribe the details of educational policy in individual cases and must present specific plans for approval to the United States Commissioner of Education who, if he finds that a state's plan is not in conformity with the Act and federal regulations thereunder, may withhold funding, with the state given a right of appeal to a federal court of appeals, 20 U.S.C. Section 1416. See, e.g., Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities").
>
> Pursuant to the Act the State of New York has adopted parallel legislation and the State Commissioner has promulgated specific regulations which do not require provision of a sign

> language interpreter. Moreover the state's plan for education of handicapped children, which does not provide for sign language interpreters, has been approved by the federal Commissioner. In view of the approved plan's specificity with respect to audiology services, and the statute's policy in favor of administrative determination of what services are appropriate, a very strong showing is required to depart from that policy. The showing here does not meet that test. (AA-15-20). ___F2d __,__.

This Court must address the question of what showing is necessary to set aside the State plan; and whether the court, rather than the Federal Commissioner, is the proper agency to consider that issue. Viewed from another perspective, this Court must address itself to the scope of federal review under Section 1415(e)(2) of the Act.

The Act defines an appropriate education as, essentially, one which "meet[s] the standards of the State education agency." 20 U.S.C. 1401(18). To be

eligible for assistance under the Act, a state must submit to the Commissioner evidence that it has developed a plan which sets forth in detail the policy and procedure (i.e., its standards) to ensure that each handicapped child receives "a free appropriate public education." 20 U.S.C. 1412(2)(B) and 1412(3). Once a state has demonstrated eligibility, it must then submit to the Commissioner a plan demonstrating that the funds received will:

> . . . be utilized by the State or any of its political subdivisions, only in a manner consistent with the goal of providing a free, appropriate public education for all handicapped children . . .

20 U.S.C. 1413(a)(2).

The Act requires the Federal Commissioner to measure and evaluate the impact and effectiveness of the State's efforts to ensure a free appropriate public

education, specifically in regard to handicapped children who are educated in regular classrooms, within each disability.[4] 20 U.S.C. 1418(b)(1)(C). The Commissioner is required to report the results of his evaluations to the Congress and to the public. Id.

The Regulations, at 45 C.F.R. 121a. 120-121, provide a complete scheme for submission of the State's plan to the Commissioner, and identify what the State plan must contain in order to merit approval.

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4. New York State submitted specific plans to the Federal Commissioner for the education of deaf children in regular classrooms in the State. The State's directive to its local districts is at 8 N.Y.C.R.R. 200.4 (d)(4)(A-K1).

The question of whether a local school district is providing an appropriate education must be resolved by inquiring whether such education is in conformity with the State's requirements, if the State's plan has been approved by the Commissioner.

In its decision, affirmed by the Court of Appeals for the reasons set forth therein, the District Court did not recognize the role of the Federal Commissioner. It failed to dismiss the case when the School District showed it was providing an appropriate education under the State plan. It held that under the Act:

> Aside from the HEW regulation quoted above it has been left entirely to the courts and the hearing officers to give content to the requirement of an "appropriate education" (Emphasis supplied) (A-C 11) 483 F.Supp. 528, 534.

In effect, the complaint in this case challenged the State's plan. The State's plan does not include provision for sign language interpreters for deaf pupils in regular elementary school classrooms. (Neither does it forbid it if that is what the local district elects to do.) Whether that is a correct judgment is for the Federal Commissioner to review, not the District Court.

The appeal procedure, 20 U.S.C. 1415 (e)(2), has not been provided to allow independent hearing officers and the courts to dictate to the states correct measures of remediation for particular classes of handicapped children. That is what the state plan is supposed to do. In formulating such a plan, the state has to take into account the resources it will devote to the various forms of remediation, the practicality and

feasibility of those measures and the likely efficacy of those measures, given the limitations of the state's resources.

The cost of interpretive services for Amy Rowley will be approximately $20,000 - $25,000 per year, at current rates. An extension of that cost to similarly situated deaf students in the State would cost over one hundred million dollars per year.

Judge Sloviter in his opinion (concurring and dissenting in part) in Battle v. Com. of Pa., 629 F2d 269, 284 (3rd Cir., 1980), stated:

> I agree with both of my colleagues that the contours of the state's program must be defined by the state. It is the state which must determine which specific programs should be offered, how those programs must be structured, and how the delicate and intricate balancing of funds and resources between handicapped and non-handicapped children must be managed. In the process, different states may establish somewhat varying immediate goals as steps toward realization of the federal policy.

If the District Court's opinion is correct, and it has been left entirely to the courts and hearing officers to determine what is an appropriate education, what limitations are placed upon the exercise of that discretion? Must the local school district do anything necessary to ameliorate the adverse impact resulting from a disability, regardless of cost? If that is the standard, cost considerations are irrelevant and Congress has created a scheme of unlimited liability for the states and local school districts.

A reading of the legislative history of the Act reveals that the question of financing at the federal, state and local levels was of paramount concern.

The Act was an effort to reconcile a number of competing interests: the desire of associations of handicapped persons to focus attention and funding on their needs, the desire of state and

local educational bodies to maintain their autonomy in deciding the manner and method of educational programs, and the need to apportion limited tax resources among a variety of valid, competing interests. The Act reconciled these competing forces by placing ultimate responsibility for the provision of a free appropriate public education on the states, under the state plans. The Court of Appeals' decision transfers that responsibility to hearing officers and district courts.

At the time Congress passed the Act, this Court had decided San Antonio School District v. Rodriquez, 414 U.S. 1, 93 S.Ct. 1287, 36 L.Ed. 2d 16 (1973), in which it held that education was not a right afforded explicit or implicit protection under the Constitution.

The Court said:

> The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's right to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.
> 411 U.S. 1, 36.

It is highly unlikely that Congress, in passing the Act two years after this Court's decision in Rodriquez, intended to obliterate the distinctions of the Federal system. The more likely interpretation is that Congress intended the Act to be reflective of the distinctions in the Federal system; and to make the States responsive to the

mandate of the Act, as a condition for receipt of federal aid.

The appeal procedure is in place to allow the state, and ultimately the court, to determine whether the local district is providing a free appropriate public education. 20 U.S.C. 1414(b)(3).

The appeal procedure resolves issues of fact, not policy. It determines questions of correct diagnosis, correct placement in the least restrictive educational environment given the nature of the handicap, correct classification as a handicapped child, and correct placement in a particular educational institution. It is not in place to allow the federal court to step in and say that every regular class, containing a deaf child, in the State of New York has to have a sign language interpreter. That is a decision for the state to make, not the

court.

Those who disagree with the state's policy determination are not left remedyless. 20 U.S.C. 1412(7) provides that in formulating its plan the state shall assure that procedures for consultation with individuals concerned with education of the handicapped are established; and that public hearings are held, with adequate notice given, and an opportunity for public comment provided, before adoption of its plan.

The District Court's decision is not based on facts peculiar to Amy Rowley. In making its determination, the Court found a need for a sign language interpreter by extrapolating to Amy information applicable to all deaf children, and ignored testimony as to Amy's extraordinary academic achievements. The Court's method of reaching its decision, and the Court of Appeals' affirmance of that decision,

makes inevitable its application on an almost universal basis.

Certiori should be granted in order for this Court to delineate the roles of the individual states in formulating plans under the Act; the Federal Commissioner in overseeing those plans; and federal courts in reviewing the appropriateness of educational placements made by local educational agencies in conformity with state plans.

3. As the Act mandates assessment of the unique individual needs of handicapped pupils before placement can be made, the Court of Appeals erroneously affirmed the District Court decision, which was based on the perceived needs of a class of handicapped persons.

Under the Act, handicapped children are defined as those whose impairments mandate provision of special education and related services (20 U.S.C. 1401(1), 45 C.F.R. 121a.5)). Special education is defined as a specifically designed instruction to meet the unique needs of the child (20 U.S.C. 1401(16), 45 C.F.R.121a. 14(a) (1)). The "free appropriate public education" which is to be provided to handicapped pupils must, inter alia, conform to an individualized education program which is specially designed to meet the unique needs of the child (20 U.S.C. 1401(16) (19); 45 C.F.R. 14(a)(1)).

The statutory scheme mandates pro-

vision of an educational program which is based upon evaluation of the unique needs of the individual child, and which is designed to meet those needs in the least restrictive environment.

The Court of Appeals in this case affirmed the District Court decision which ignored the clear mandate of the Act, and it did so for the reasons set forth in that decision. In so doing, it has given great precedential weight to the proposition that it is the needs of the class of handicapped persons which should be looked to in evaluating the appropriateness of the handicapped pupil's placement, rather than the unique needs of the individual.

After developing its own definition of "free appropriate public education" the District Court found its own standard too difficult to apply. It therefore ignored all testimony as to Amy Rowley's

outstanding academic achievements, performance in class, and ability to comprehend what was taking place in the classroom; and focused instead on testimony as to general theories of the benefits to the deaf of the use of total communication.

Not one of the Plaintiffs' witnesses at the hearing before the Independent Hearing Officer, or at the trial in District Court, testified about Amy Rowley's classroom performance. Plaintiffs' only testimony which even approached the question of how Amy was performing in school was given by Amy's mother, Nancy Rowley. She said that she had observed Amy's class (R-T 72), but gave no details. However, the Respondents' witnesses, who had observed Amy, testified extensively as to her understanding of what transpired in the classroom, and her academic achievement.

The most detailed and exhaustive testimony on how Amy functions in class was given by the noted audiologist, Dr. Ann Mulholland, who said that Amy's hearing in the low frequencies is close to normal (R-T 373). She testified that when Amy was called from behind by her teacher, Amy turned around to face her (R-T 352). The same phenomenon was observed by another expert, Marianne Pappas, a year prior, in Amy's first grade class (R-A 143).

The testimony by Ms. Pappas (R-A 142 - 148) and Dr. Mulholland (R-T 342-392) about their verbal interaction with Amy in each of two academic years is moving and startlingly convincing evidence that Amy understands all of what is transpiring in her class. It was unrebutted.

Dr. Mulholland's testimony left no doubt that Amy is succeeding. Amy can

read and spell (R-T 347); she communicates with the children around her (R-T 349); she can do mathematics and help the children who are having difficulty (R-T 350-352); she is comfortably and gracefully accepted by her teacher and fellow students (R-T 356); and she scores well on both class and achievement tests (R-T 358-360). Dr. Mulholland said that a sign-language interpreter was not needed (R-T 360), and might be harmful (R-T 361). She said she felt that she had sufficient information to make a valid judgment, and that on the basis of her clinical experience Amy's education was appropriate and adequate. (R-T 391-392).

The testimony of the School District's witnesses also showed beyond doubt that the goals developed for Amy as part of her individualized education program were met. (Those goals are stated in the

IEP found at R-A 173-195.)

The District Court based its decision that Amy Rowley requires the services of a sign language interpreter in her classroom, not upon Amy Rowley's individual needs, but rather upon testimony that

> . . . there is a marked trend towards the use of total communication in the education of the deaf - a trend supported by studies showing the greater degree of success of students brought up in deaf households using total communication. (A-C 16) 483 F.Supp. 528, 535.

The Court of Appeals affirmed the District Court decision " . . . substantially for the reasons set forth in Judge Broderick's well reasoned opinions . . .". (A-A6) _____F2d _____, _____. However, the reasoning employed by the District Court in reaching its decision was clearly contrary to the manifest intent of the Act.

While the Act mandates a provision of

a special education designed to meet the unique needs of the handicapped child, the District Court ignored voluminous testimony concerning the unique needs of Amy Rowley, and based its decision on the following syllogism: deaf students can benefit from use of a sign-language interpreter; Amy Rowley is a deaf student; therefore Amy Rowley could benefit from use of a sign-language interpreter.

If this case is allowed to stand as precedent, courts could reach determinations under the Act, based on the category of handicapping condition, rather than on the unique needs of the individual pupil, and thus thwart the purpose of the statutory scheme.

4. The Court of Appeals erroneously held that the federal courts have jurisdiction to hear cases arising under the Education for All Handicapped Children Act without regard to the administrative procedures contained in the Act.

In sustaining the District Court, the majority of the Court of Appeals disregarded the statutory scheme, frustrated the intent of Congress, and exceeded the federal court's statutory jurisdiction.

The Act, as well as parallel legislation enacted in New York in 1976 (New York Education Law Section 4401 et. seq.), requires that each of the more than 200,000 school aged, handicapped children in New York be provided with a free appropriate public education. In enacting this legislation Congress imposed various conditions and duties upon local and state educational agencies to ensure that

these children would benefit from their educational placements (see 20 U.S.C. 1401 (17) & (18), 1413 and 1414), and established certain procedural safeguards that must be followed each time a handicapped child is identified, evaluated or placed (20 U.S.C. 1415).

Within the framework of these mandated procedures, Congress clearly defined the roles of the state and local educational authorities.

Under the Act, the status of each handicapped child must be reviewed by the local educational agency ("LEA") at <u>least once each year</u> (see also New York Education Law Section 4401 (1)). Upon completion of its review, which includes an evaluation of the child's progress in the present placement, the local educational agency must offer the child a free appropriate public education which will meet his special educational needs for

the next succeeding school year. If the parents or guardians of the child disagree with the placement offered by the LEA, they have the opportunity to seek a due process hearing at the local level before an inpartial hearing officer.

Thereafter, either party may appeal the hearing officer's decision to the State Commissioner of Education, who has the duty to conduct an impartial review of the hearing and make an independent decision upon completion of his review (20 U.S.C. 1415(c) & (d). It is incumbent upon the State Commissioner to review the placement offered for that year and to determine if it is educationally sound and is in compliance with the state plan.

In this case, the parents of Amy Rowley objected to the placement offered her by the Board of Education of the Hendrick Hudson Central School District

for the school year 1978-79, solely because it did not provide their child with the services of a sign language interpreter when academic subjects were being taught in the classroom. A hearing was held before an Independent Hearing Officer, and he found that the LEA was providing an appropriate education for that year.

On appeal, and after reviewing the record of the hearing held at the local level, Gordon Ambach, the New York State Commissioner of Education, determined that the child was receiving an appropriate education for the school year 1978-79.

Following Commissioner Ambach's determination relating to Amy's 1978-79 placement, the parents commenced an action against the Hendrick Hudson School District in the Federal District Court (S.D.N.Y.) in accordance with 20 U.S.C. 1415(e)(2). The parents' complaint

related solely to the LEA's failure to include a sign language interpreter in the individualized educational program (IEP) developed for the 1978-79 school year. The parents failed to join as Defendant, Commissioner Ambach, until the LEA moved to dismiss the complaint, inter alia, on that ground. The Commissioner could have provided the District Court with the records of the administrative proceedings. The failure to join him as a party resulted in a five month delay in the judicial proceedings below.

Subsequent to the commencment of the action below, but before the State Commissioner was made a Defendant, the parties stipulated that the District Court should review not only the child's educational placement for the school year 1978-79 but also her placement for the school year 1979-80, which had not yet

begun (A-D 3) 483 F.Supp. 536, 538.

The Commissioner objected to the court's jurisdiction to make a decision for 1979-80 without the benefit of prior administrative proceedings. The Court held that it had jurisdiction. (A-C 19) 483 F.Supp. 528, 533, and the Court of Appeals affirmed.

The appeal procedure established by the Act is in conformity with this Court's decisions underscoring the importance of local control of educational matters. (San Antonio Independent School District v. Rodriquez, supra; Milliken v. Bradley, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed 2d 1069 [1974]; Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 226, 21 L.Ed 2d 228 [1968]).

As this Court has recognized, local and state education agencies, rather than the courts, possess expertise in the

educational field. The statute specifically requires review of placement by the state agency, prior to commencement of court actions. Presumably, this was done in order that the courts would be able to review findings made by an agency possessing experience and expertise in the subject at issue.

It is only after the State Commissioner of Education has reviewed the placement of a handicapped child that appeals may be taken to state or federal courts. Under 20 U.S.C. 20 1415(e)(2) the only parties who may commence such appeals are those who have been aggrieved by the findings and decision of the state educational agency; either after a hearing before such agency under 20 U.S.C. 1415(b)(2), or after the review by the state educational agency, of a hearing conducted by the LEA, under 20 U.S.C. 1415c.

In this case the District Court permitted two parties to agree to submit to its jurisdiction Amy Rowley's placement for the 1979-80 school year. This placement had not been reviewed by the State Commissioner, administrative remedies had not been exhausted, and jurisdiction could not be conferred by consent of the parties. The Court of Appeals failed to address this jurisdictional issue.

This Court should grant Certiorari to decide the jurisdictional question, and to review this case in light of other holdings by this Court which have underscored the importance of local control of educational matters.

5. The Court of Appeals' attempt to limit the applicability of its decision to the facts of this case constituted error, in view of the national importance of the issue and the precedential weight its opinion has given to the District Court decision.

Section 0.23 of the Rules of the Second Circuit (U.S. Ct. of App. 2d Cir. Rule 0.23, 28 U.S.C.) reads as follows:

> "The demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.
>
> Where a decision is rendered from the bench, the court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other

court. (emphasis added)

The majority of the Court of Appeals has cited the above rule in an attempt to limit its holding to the facts of the instant case, and preclude review by this Court. In Footnote 7 of its decision (A-A 7-8) ___ F2d ___, ___, the Court stated that, because of the unique facts involved, the decision may not be cited as authority in <u>any other</u> case.

The Second Circuit has misapplied the above rule to the instant case. The facts of this case are not unique, but rather are applicable to every handicapped child living within the jurisdiction of the Second Circuit.

The District Court concluded that every deaf child would fare better in the classroom with an interpreter, and therefore directed that an interpreter must be provided to Amy Rowley by the state and local educational agencies

(A-C 16) 483 F.Supp. 528, 535. It went further, and concluded that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children; and in order to gauge whether this opportunity has been given, the Court's holding requires that the potential of the handicapped child be measured and compared to his or her actual performance, and that the resulting differential or "shortfall" be compared to the shortfall experienced by non-handicapped children (A-C 11-12) 483 F.Supp. 528, 534.

The Court of Appeals specifically agreed with these conclusions, affirmed for the reasons set forth in the District Court's opinion and memorandum order, and stated "We are satisfied that the Court meticulously applied precisely the standard prescribed by Congress". (A-A 7), ___ F2d ___, ___.

While the Second Circuit attempted to limit the precedent value of its affirmance, the language of the District Court's decision has general application, and the affirmance adds great weight to its pronouncements. The District Court's decision cannot be ignored by future litigants. (See discussion, page 18, supra).

If the Second Circuit panel was correct when it adopted the District Court's ruling over the meaning of the Act, then that opinion should be citable and should provide guidance to future litigants. If not, it should at least be reviewable by this Court.

It is apparent to the Petitioners that only this Court can now answer these critical questions concerning the standards for the education of handicapped children in the Second Circuit and in the entire

country, and at the same time avoid unnecessary and wasteful litigation.

The Act is already over five years old, and yet very few cases seeking judicial interpretation of the Act have reached the courts. In light of the limited decision of the Court of Appeals, which failed to address numerous issues raised by the Petitioners, and further failed to enunciate a standard to be followed in the Circuit, it is anticipated that further litigation will be required to determine and apply a general standard, unless this Court now resolves the issue.

## CONCLUSION

Wherefore, Petitioners respectfully request that this Petition for a writ of certiorari be granted.

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Respectfully submitted,

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